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Supreme Court of the United States

October Term, 1948.

No. 487

DOUGLAS CHANDLER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF PETITION.

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Supreme Court of the United States

October Term, 1948.

No. .....

DOUGLAS CHANDLER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Douglas Chandler respectfully shows as follows:

Summary Statement of the Matters Involved.

The petitioner, hereinafter called the defendant, was convicted of treason against the United States upon an indictment returned into the District Court of the United States for the District of Massachusetts on December 30, 1946 (R. 1-9). Judgment that he should be imprisoned for life and be sentenced to pay a fine of Ten Thousand Dollars ($10,000) was entered on July 30, 1947, after trial by jury (R. 32-34). The judgment was affirmed by the United States Court of Appeals for the First Circuit on December 3, 1948.

The opinion of the Court of Appeals summarizes the indictment as follows:

The indictment charged that the defendant, in various places within the German Reich, and at all times beginning on December 11, 1941, and continuing thereafter up to and including May 8, 1945, he then and there being a native-born citizen of the United States, and a person owing allegiance to the United States, in violation of said duty of allegiance, did knowingly, intentionally, and traitorously adhere to the enemies of the United States, and more particularly, to wit, the Government of the German Reich, and the German Radio Broadcasting Company and the officials and employees thereof, giving to the said enemies of the United States aid and comfort within the United States and elsewhere; that the aforesaid adherence of the defendant, and the giving of aid and comfort by him to the aforesaid enemies of the United States "consisted of working as a radio speaker and commentator in the U. S. zone of the Short Wave Station of the German Radio Broadcasting Company, a company controlled by the German Government, which work included the preparation and composition of commentaries, speeches, talks and announcements, and the recording thereof for subsequent broadcast by radio from Germany to the United States"; that these activities of the defendant "were intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of said war, and to weaken and destroy confidence in the administration of the Government of the United States." Paragraph 4 of the indictment enumerates 23 overt acts alleged to have given aid and comfort to the said enemies and which were knowingly and traitorously committed by the defendant with treasonable intent to adhere to and give aid and comfort to said enemies. Thirteen of these overt acts were withdrawn from consideration, some by the United States and others by the district judge, so that ten were sub-

mitted to the jury as possible acts of treason. Generally described, one of these overt acts was arranging for the making of a recording, two were speaking into a microphone in the actual recording of talks for broadcast, one was participation in a conference for improvement in the operation of the Short Wave Station, two were attendance and participation in conferences of radio commentators at which directives were received from higher authority relative to the content of broadcasts, four were participation in conferences aimed at securing the resumption or continuance of defendant's broadcasting activities.

The indictment concluded:

> "That the District of Massachusetts was the Federal Judicial District into which the defendant was first brought, shortly prior to the date of the return of this indictment."

There was some evidence in support of all the allegations of the indictment, except, as we believe, the averments as to venue.

There was, however, no allegation, and no direct proof by two witnesses, of anything said by the defendant in any of his talks recorded for broadcast, hereinafter for convenience sometimes called broadcasts. Twelve recordings, made at various dates in 1942, and identified by witnesses as reproducing the defendant's voice, were introduced in evidence and played to the jury, but solely upon the issue of his intent to betray. Other evidence as to the content of defendant's broadcasts described it only in vague and general terms.

None of the recordings introduced in evidence was specifically related to any of the overt acts set out in the indictment. Two of the overt acts, numbered 17 and 18 in the indictment, consisted of speaking into a microphone, but

there was no allegation nor requisite proof of what was then said. The jury were, however, permitted to infer from the existence of a treasonable intent manifested by the recordings made in 1942 that what was said in 1944 was propaganda. See the charge (R. 1833):

> "If you find beyond a reasonable doubt that Chandler voluntarily caused broadcast recordings to be made as charged in overt acts 17 and 18 and they contained propaganda that assisted Germany in its psychological warfare against the United States, and you also find beyond a reasonable doubt that these recordings actually assisted Germany in its war effort against the United States, you must find the defendant gave Germany actual aid and comfort in the conduct of its war against the United States by means of these recordings."

All of the other overt acts submitted to the jury were acts merely preparatory to broadcasts. Whether they directly resulted in any was not alleged nor shown by proof.

There was no evidence that broadcasts of the defendant's talks were heard in the United States except by employees of the Federal Communications Commission, nor that, if heard, they actually had the effect intended.

The evidence was overwhelmingly to the effect that the defendant sincerely believed his broadcasts to be in the best interests of the United States and that he made them from patriotic motives. His attitude toward his conduct was thoroughly studied by psychiatrists employed both by the government and by defense counsel, who testified with respect to it on the issue of insanity. They differed only as to whether the defendant was a true paranoiac or merely a fanatic. All agreed that he was utterly sincere and patriotic (R. 1493, 1543, 1574, 1623, 1646, 1648, 1666, 1339, 1387, 1423). Moreover, the case was submitted to the jury with

instructions that if the defendant's words were intended for use as "propaganda", the fact "that his motive was not to aid the enemy but was a desire to save the United States and the world from a Jewish or Bolshevist menace, or to obey a call, or to change the personnel of our government" was immaterial (R. 1823). "Propaganda" was defined as "the dissemination of ideas for the purpose of influencing people and it may be true or false" (R. 1830). The jury were permitted to find the defendant guilty although what he said was true and motivated by a desire to save the United States from perils in the existence of which he sincerely believed.

Certain questions in the case arise out of the manner of the defendant's removal from Germany to the United States. Briefly summarized, the facts were as follows:

An earlier treason indictment was returned against the defendant on July 20, 1943, in the United States District Court for the District of Columbia, although that Court then had no jurisdiction of the defendant's person nor of the subject matter. In May, 1945, the defendant was taken into custody by the United States Army in Germany, but released on October 23, 1945. He was re-arrested by the Army on March 12, 1946, at the request of the Department of Justice, and held abroad until December 10, 1946, when he was removed under armed guard by plane to the United States, stopping en route at Paris, the Azores, and Newfoundland. The intended destination was Washington, D. C. The plane came into the United States in the State of Maine. As a result of mechanical trouble, an unscheduled landing was made at Westover Field, Massachusetts, early in the morning of December 14, 1946. The defendant was taken from the plane and remained at the field for about three hours, and was then placed on another plane and brought to Washington, D. C. He was there arrested by a

United States Deputy Marshal and arraigned on the earlier indictment. On December 30, 1946, the indictment on which he was tried was returned and on the following day he was arrested on a capias issuing out of the District Court for the District of Massachusetts and removed to that district.

The defendant filed a motion to dismiss the indictment, a motion for discharge from custody in the nature of a plea to the jurisdiction of his person, a motion challenging the venue, a motion for acquittal, and a motion in arrest of judgment. The questions of law upon which the appeal is based arose upon the denial of these motions, upon certain portions of the charge, upon refusals to give instructions requested, and upon rulings on the admission of evidence.

Reasons Relied on for the Allowance of the Writ.

Your petitioner is advised and alleges that the decision of the Circuit Court of Appeals was erroneous and should be reviewed by this Court, in that—

1. The decision is that treason against the United States is committed by a citizen of the United States residing in territory of their enemies, who adheres to such enemies, giving them aid and comfort.

2. The decision is that treason is committed under such circumstances although the only acts of aid and comfort are the preparation for publication of talks intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of a war and to destroy confidence in the administration of the government of the United States; that is, that the expression of ideas and opinions in such a case may be a treasonable act.

3. The decision is that there may be a conviction for treason under such circumstances without allegation or proof by two witnesses of what was said in such talks.

4. The decision is that there may be a conviction without any evidence that such talks actually had or would naturally have the effect intended.

5. The decision is that a course of conduct over a period of more than three years may be charged as a single treasonable enterprise but that direct proof by two witnesses, of a few fragmentary and relatively insignificant elements of that course of conduct will warrant a conviction.

6. The decision is that the publication of words intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of a war and to destroy confidence in the administration of the government of the United States is evidence of a treasonable intent.

7. The decision is that such words are evidence of a treasonable intent though spoken from patriotic motives upon a sincere conviction that their publication is for the best interests of the United States.

8. The decision is that an intent to give aid and comfort is equivalent to an intent to betray.

9. The decision is that a District Court of the United States may lawfully exercise jurisdiction over the person of a defendant brought within the Court's jurisdiction in violation of the laws of the United States.

10. The decision is that a citizen of the United States charged with treason might during the occupation of Germany by the United States Army be lawfully brought to the United States, in violation of the right of asylum granted by

treaty and international law, by the use of the Army in violation of statute, 10 U. S. C. #15.

11. The decision is that Congress has by law directed the place of trial of treason committed within the territorial jurisdiction of a foreign government.

12. The decision is that a defendant brought into the United States by the Army in a plane which traverses the District of Maine bound for the District of Columbia, and transferred to another plane in the District of Massachusetts to complete the transit after a brief pause because of mechanical trouble, is first brought into the District of Massachusetts within the meaning of Judicial Code, Section 41.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the First Circuit, commanding that Court to certify and send to this Court on a certain day to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled in its docket, No. 4296, *Douglas Chandler, Defendant, Appellant, v. United States of America, Appellee*, to the end that said case may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief in the premises as to this Court may seem just and proper.

DOUGLAS CHANDLER,
By his Attorney,
EDWARD C. PARK.

SUPREME COURT OF THE UNITED STATES

October Term, 1948.

No. .....

DOUGLAS CHANDLER,
Petitioner,
vs.
UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION.

Opinions of the Courts Below.

The opinions in the United States District Court for the District of Massachusetts upon a motion to dismiss the indictment and upon an inquiry into the defendant's sanity are reported in *United States v. Chandler*, 72 F. Supp. 230, and in the record (R. 41, 52). The opinion of the United States Court of Appeals for the First Circuit is not yet reported but appears in the record (R. 1908—1946).

Jurisdiction.

The judgment of the United States Court of Appeals was entered on December 3, 1948. Jurisdiction of this Court to issue the writ applied for is invoked under Title 28, United States Code, Section 1254 (1).

Statement of the Case and Specification of Errors.

The summary statement of the matters involved in the case given in the petition contains in brief form all that is

material to the consideration of the questions presented. The statement of reasons relied on for the allowance of the writ shows the errors intended to be urged. In the interest of brevity, they are not reiterated at this point.

Argument.

The writ prayed for should issue:

I. THE QUESTIONS DECIDED BY THE COURT OF APPEALS ARE IMPORTANT AND HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT.

We know of no prior conviction for foreign treason, that is, where the overt acts were committed beyond the territorial jurisdiction of the United States. If the statute extends to foreign treasons, particularly by a citizen domiciled in enemy territory and, therefore, subject to a local allegiance to the sovereign of that territory, what trafficking with the enemy in such a case constitutes a criminal adherence and giving of aid and comfort should be defined.

We know of no prior conviction for treason based on "the dissemination of ideas for the purpose of influencing people, and it may be true or false" (R. 1830). If such a conviction may be sustained, this Court should determine whether it is enough to show that the defendant had a general purpose to persuade citizens and residents of the United States to decline to support the United States in the conduct of a war or to destroy confidence in the administration of the government, and to establish by two-witness proof certain preparatory acts without such proof of what was said or the effect of what was said.

May a course of conduct extending over a period of years be charged in a single count as a single treasonable enter-

prise and established by two-witness proof of isolated acts which are but minute fragments of the whole? No prior decision has so held.

Is treasonable intent necessarily to be inferred from an expression of ideas and opinions which may give the enemy aid and comfort? The District Court so instructed the jury, in substance. Or may a jury infer treasonable intent from any words in opposition to a war? Perhaps, this is what the Court of Appeals purported to decide. Or is the rule simply this, that a citizen, residing in enemy territory, may not publish his views about the war if he does so for the enemy? Is it immaterial and not to be taken into consideration by the jury that the views expressed were entertained sincerely and were in fact voiced from patriotic motives? Is the question whether the defendant "had the heart of a patriot" to be answered only by God, and not to be submitted to a jury, as the Court of Appeals suggests? If these questions are answered as they were by the District Court and the Court of Appeals, the crime of treason may be committed without a guilty mind. This Court should examine those questions.

We think it is clear that the defendant was entitled to asylum in Germany for political offenses against the United States under general principles of international law and under the terms of a treaty between the two nations. The questions, whether the military occupation of Germany by the United States terminated that right of asylum, and, if not, whether a United States Court should exercise jurisdiction of one unlawfully deprived of it, have never been decided by this Court and should be.

Finally, the jurisdiction of the subject matter should be examined. If Congress has made foreign treason a crime, has it appointed a place for trial as required by the Constitution? And if Section 41 of the Judicial Code with re-

spect to "Offenses on the high seas" is applicable, do the words "first brought" have one meaning when a person charged with crime is brought in by air and another when brought by sea? If, as the Court of Appeals remarks, the objection to the venue is upon a "highly technical ground", it is, nevertheless, one involving constitutional rights of which the defendant should not be deprived merely because it seems to the Court "unfortunate".

We are informed that all of the questions herein involved were also raised in the trial of Robert H. Best in the same District Court, from whose conviction an appeal is now pending though not yet submitted. We have read in the newspapers that the Department of Justice is prosecuting other so-called "radio traitors" in other districts, in which we presume like issues will be presented. It is in the interest of all concerned that the principles applicable should be considered and promulgated by this Court.

II. The decision below is in conflict with principles laid down in decisions of this Court.

We suppose that we should not try, within the limits of a brief in support of a petition for certiorari, to argue fully as many questions as this case presents, or to furnish more than an abridgment of the reasons why we believe the decision of those questions by the Court below to have been erroneous. What follows is not, therefore, all that may be said for the defendant.

(a) Treason against the United States is not committed by a citizen residing in territory of their enemies, who adheres to such enemies, giving them aid and comfort.

We do not believe, as did the Court of Appeals, that it is clear that under the constitutional definition of treason

Congress has power to punish a citizen residing in enemy territory for treason, at least if what is charged as treason consists merely of adhering to the enemies of the United States, giving them aid and comfort.

It has always been recognized that, by reason of the obligation of local allegiance to the country of residence, there might be in such a case some adherence which was not criminal.

The Venus, 8 Cranch 253.
McConnell v. Hector, 3 Bos. 6 Puller's Reports, 113, 114.
Hale: *Pleas of the Crown*, pp. 164-165.

Indeed, prisoners of war may volunteer for work "for a variety of purposes designed directly to aid the captor in the prosecution of the war, enabling it to release potential fighters from non-military tasks of which the proper performance might be, nevertheless, a military necessity".

3 Hyde: *International Law*, p. 1851.
War Department: *Rules of Land Warfare*, Sections 100-104.
Geneva Convention of 1929, Art. 27.

It must be clear that citizens of the United States residing in an enemy state are not guilty of treason by reason of some acts of trafficking with the enemy which, in the case of other citizens, might warrant a conviction.

Accordingly, the omission of express words of territorial limitation from the constitutional definition, may have been wholly in the interest of simplification on the theory that the principle of construction against extraterritorial effect would govern.

In any event the Act of Congress, 18 U. S. C. #1, should not be given extraterritorial effect. To provide the same

test of treason in the case of citizens residing in enemy territory as in the case of those residing in the United States would be unreasonable. If Congress had intended to punish foreign treasons, it would have legislated specifically against them. In view of all the doubts, including those as to the constitutional power, the statute should not be construed as including adherence in enemy territory to the enemies of the United States.

(b) Treason is not committed by the expression of ideas and opinions.

> "That mere words that are expressions of opinion, printed or written, will not constitute acts of treason"

was conceded by the District Court in its opinion on the motion to dismiss (R. 47). The proposition seems to be fully supported by the authorities.

Frohwerk v. United States, 249 U. S. 204, 208.
United States v. Werner, 247 F. 708, 710.
Wimmer v. United States, 264 F. 11.
Equi v. United States, 261 F. 53.
United States v. Herberger, 272 F. 278.
Chafee: *Free Speech in the United States*, pp. 259-260.
Hurst: *Treason in the United States*, 58 H. L. R. 430.

And if expressions of opinion will not constitute treason, acts preparatory to their publication, such as conferring with others, can hardly be charged as overt acts.

The Court of Appeals said of the "statements to be found in the books to the effect that mere words cannot amount to an overt act of treason":

"That is true in the sense that the mere utterance of disloyal sentiments is not treason; aid and comfort must be given to the enemy. But the communication of an idea, whether by speech or writing, is as much an act as is throwing a brick, though different muscles are used to achieve different effects. * * * The significant thing is not so much the character of the act which in fact gives aid and comfort to the enemy, but whether the act is done with intent to betray" (R. 1932-33).

There is, of course, logic in what the Court of Appeals says. There are, however, cases in which, as Mr. Justice Holmes once observed, "a page of history is worth a volume of logic". *New York Trust Co. v. Eisner*, 256 U. S. 345, 349. We think this such a case. See

Hurst: *Treason in the United States*, 58 H. L. R. 430:

"In the great English treatises from which American lawyers took their knowledge and ideas of the English law, the outstanding note of political liberalism in the discussion of treason was the detailed condemnation of the doctrine that 'mere' spoken or written expression of ideas, not amounting to a direct persuasion or consulting to kill the king, could constitute the crime * * *.

"* * * Plainly Article III, Section 3, was viewed as completely barring prosecutions of such conduct as 'treason', and such has been the opinion of the courts."

Logically, if words in opposition to a war may be overt acts of treason, and if a jury may infer a treasonable intent from the fact that such words will naturally give aid and comfort to the enemy, without regard to the patriotic motives prompting their utterance, proof of publication should be enough to support a conviction. The Court, however, suggests that the Constitution grants a special immunity for the expression of opinions to citizens, "whatever the speaker's purpose", "in the normal processes of domestic political opposition", but that such immunity

would not extend to the defendant, since "he trafficked with the enemy and as their paid agent collaborated in the execution of a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully" (R. 1934-35).

The theory of the Court appears to be that words which it is known will give the enemy aid and comfort are treason, but that such treason is privileged if "in the course of the normal activities of political opposition". But a speech in the United States in the course of such normal activities would naturally be far more dangerous to the United States than the same speech cast upon the air by an enemy agent in Germany to an audience limited to those owning short wave radio equipment and by the vicissitudes of radio transmission. The Court of Appeals suggests that the immunity is afforded:

> "in order that, in the course of normal activities of political opposition, the expression of honest criticism and sincere conviction as to what is best for the country may not be fettered by fear of a jury's finding of traitorous purpose in the passion and tumult of a subsequent prosecution for treason" (R. 1934).

This means, as we understand it, that the question whether the words were an "expression of honest criticism and sincere conviction" should not be left to the jury. If it were, the supposed immunity might be lost "in the passion and tumult of a subsequent prosecution". But is it for the jury to decide whether the words were spoken "in the course of normal activities of political opposition"? And if they were not, is it material that they were expressions of honest opinion and sincere conviction? The Court of Appeals thought not, at least, in this case:

> "Whether Chandler was 'sincere' in what he did, whether he had the heart of a patriot, is a matter that

may be sifted out at the Last Great Judgment Seat; but the law of treason is concerned with matters more immediate" (R. 1943).

We submit that the theory that expressions of opinion may be treasonable, whether or not sincere and proceeding from the heart of a patriot, and are immune or privileged only if "in the course of normal activities of political opposition", is unsound. Historically, "mere words", meaning thereby "the dissemination of ideas for the purpose of influencing people", have been held not treasonable because not overt acts. The distinction drawn has been between mere talk about what to do, and doing. We submit that that distinction is still valid, and that "mere words", even if they are revolutionary words, cannot make overt acts of treason.

(c) If treason may be committed by "mere words", it is not enough to allege and prove by the direct testimony of two witnesses that the defendant spoke or prepared to speak.

If the expression of ideas and opinions constitutes treason, it is the gravamen of the offense, not merely its setting. It is the words spoken, and not acts like telephoning for an appointment to speak them or presenting oneself at a microphone so that the words may be recorded or using the muscles required for speech, which give aid and comfort to the enemy. The treasonable character of the dissemination of ideas must depend primarily upon the words used. If what is said is lawful, the act of preparing to say it cannot be regarded either as a crime in and of itself or as a step in the performance of a crime.

The words are the essential facts constituting the offense and should have been set forth in the indictment. Rule 7 (c) of the Federal Rules of Criminal Procedure.

The words are the overt acts and should have been specially laid as such in the indictment.

> *United States v. Gooding*, 12 Wheat, 460, 475.
> *United States v. Haupt*, 136 F. 2nd 661, 665.

They should have been established by the testimony of two witnesses.

> *Cramer v. United States*, 325 U. S. 1, 34:
> "Every act, movement, deed, and word of the defendant charged to constitute treason must be supported by the testimony of two witnesses."

We find, however, in this case no allegation of what the defendant said at any time; no proof thereof by the testimony of two witnesses. The only specific evidence of what the defendant said at any time was the recordings made in 1942 and identified by witnesses as of his voice. From that evidence, admitted solely on the issue of the defendant's intent to betray, the jury was permitted to infer that when the defendant spoke into a microphone in 1944 his words were not only intended to, but did, give aid and comfort to the enemy.

The Court of Appeals upholds the conviction not because the overt acts alleged and proved "viewed in rigid isolation and apart from their setting * * * afforded aid and comfort to the enemy", but because in the light of all the evidence they "appear as typical routine activities of Chandler in the fulfillment of his continuous employment as radio commentator for the German Propaganda Ministry over a period of three years" (R. 1934).

Surely, treason is not committed by a citizen of the United States domiciled in enemy territory merely because he acts as a radio commentator. This conviction rests upon the nature of what was said. We submit that what was

said should have been set forth in the indictment and should have been shown by the testimony of two witnesses, not left to inference from other evidence.

(d) If treason may be committed by "mere words", it should be made to appear that the words actually gave aid and comfort to the enemy.

An attempt to commit treason is not within the constitutional definition. Nor will the intent dispense with proof of an act of actual aid and comfort.

Cramer v. United States, 325 U. S. 1, 25, 34.
Ex parte Bollman, 4 Cranch 75.

There was in this case no proof whatsoever that German propaganda was effective, and particularly none that the defendant's broadcasts had the effect for which they were intended. There was not even evidence that they were heard in the United States except by certain employees of the Federal Communications Commission. Any aid and comfort which the defendant's activities gave the enemy were, we believe, wholly illusory.

The Court of Appeals says:

> "It is immaterial that the enemy mission as a whole, which defendant assisted, did not achieve its purpose" (R. 1939).

Of course, we do not contend that, to make treason, an act must accomplish the purpose for which it was designed. On the other hand, mere purpose is not enough; the design must be one which may accomplish that purpose. We suppose that, even if words may be treason, mere mumbo-jumbo uttered with disloyal intent would not be. History does not show that German propaganda had any dangerous effect upon the prosecution of the war by the United States. There is room for belief that the defendant's talks of the

character shown by the recordings, if heard in the United States, would have had an effect quite contrary to that intended.

We submit that neither the Court of Appeals nor the jury were entitled to conclude upon the evidence at the trial that what the defendant said would naturally have persuaded citizens to decline to support the United States in the conduct of the war or have weakened confidence in the administration.

(e) If the indictment was not duplicitous in charging twenty-three overt acts in one count, and is to be construed as charging a single treasonable enterprise, direct proof by two witnesses of more than a few routine and insignificant overt acts was required.

We thought the indictment duplicitous, and the defect not purely technical because it might lead the jury to convict upon proof of a mere state of mind. We believe that in fact the jury did convict upon that basis. It seems to us also that the Court of Appeals has affirmed as if the existence of a course of conduct established by any evidence would warrant conviction by proof of any unimportant fragment thereof by two witnesses.

Certainly the indictment might have laid the overt acts in separate counts, and acquittal on one count would not bar conviction on another. Here there was not as in *Haupt v. United States*, 330 U. S. 631, any close relation in time between the overt acts alleged. In this case the overt acts charged extended over a period of three years and occurred in various places in Germany and Austria. If the treason consisted not of those acts but of a single enterprise, they were but infinitesimal and trivial parts of it. If not all the details in that enterprise need have been proved by two witnesses, certainly far more such proof was re-

quired. At least, its shape and broad measurements should have been so established. Clearly, even that cannot be said to have been done, since there was no such evidence of what the defendant said.

(f) Words in opposition to a war are not evidence of treasonable intent.

A citizen may in time of war attempt to persuade others not to prosecute it and may criticize the administration without being guilty of treason. This the Court of Appeals concedes, citing:

Frohwerk v. United States, 249 U. S. 204, 208.

If words may be spoken innocently, no inference of guilt should be drawn from their utterance. When any fact will support two inferences, one of innocence and the other of guilt, it does not prove guilt.

Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339.
Manley v. Georgia, 279 U. S. 1, 7.
The Bothnea, 2 Wheat. 169, 177.

In this case, the recordings of what the defendant said in 1942 were admitted solely as evidence of his intent to betray the United States, and the jury were allowed to infer from their contents an intent to betray that persisted from 1942 to 1944. What was reproduced in the court room from the recordings was undoubtedly repugnant to the jury. Yet the words might lawfully have been uttered by a citizen in the United States.

Hartzell v. United States, 322 U. S. 680, 689.

To permit an intent to betray to be inferred from speeches in opposition to a war and to convict for some later trivial act preparatory to a new speech is to enlarge

the crime of treason far beyond historical conceptions, and to make any opposition to a war some evidence of treasonable intent.

(g) Patriotic motives are inconsistent with an intent to betray and if found to exist negative such an intent.

The evidence was overwhelmingly to the effect that the defendant's activities were motivated by a desire to save his country from perils to which he believed it exposed. The District Court, in charging the jury, assumed that it might find the defendant's motives for his conduct patriotic, but instructed that that fact was immaterial.

The Court of Appeals was of the opinion that an inquiry into the defendant's sincerity and patriotism was too "subtle" a task to be imposed upon a jury (R. 1943).

But such an inquiry was not beyond the capacity of the nine psychiatrists who testified, some for the defendant and others for the government. All of them agreed that the defendant was sincere and had acted from patriotic motives. Each of them testified that he was able to form such an opinion, and that he was experienced in the detection of sham beliefs and their differentiation from ideas and opinions sincerely held. Such an inquiry by the psychiatrists was, of course, essential to their general inquiry into the defendant's mental health. We see no reason why, if the jury were to make a finding with respect to the defendant's sanity, an inquiry into an essential subordinate fact should prove too subtle.

What the Court of Appeals, however, has actually decided is that treason is to be judged objectively, by the standards of the reasonable man, without inquiry whether the defendant had the heart of a patriot, and that so judged.

> "He is guilty of treason, whatever his motive." (R. 1944).

We think this inconsistent with prior decisions of this Court.

Cramer v. United States, 325 U. S. 1, 31.
Haupt v. United States, 330 U. S. 631, 635.
Knauer v. United States, 328 U. S. 654.
Keegan v. United States, 325 U. S. 478, 494.
See also *United States v. Werner*, 247 F. 708, 710.

Moreover, the Court of Appeals in affirming the conviction has approved the District Court's instructions to the jury that the defendant's motives were wholly immaterial, although as said in *Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks*, 281 U. S. 548, 559:

> "Motive is a persuasive interpreter of equivocal conduct, * * *."

(h) An intent to do acts which give aid and comfort to the enemy is not equivalent to an intent to betray.

The foregoing quotes a request for instructions, numbered 83 (R. 1884), specifically denied by the District Court (R. 1852-55, 1694). See also his charge (R. 1822-3).

We submit that the request should have been given.

Cramer v. United States, 325 U. S. 1, 31.
Haupt v. United States, 330 U. S. 631, 635.

(i) The District Court ought not to have exercised jurisdiction over the person of the defendant if brought within the jurisdiction in violation of the laws of the United States.

We think this proposition fully supported by the following authorities which the Court of Appeals does not discuss.

Cook v. United States, 288 U. S. 102, 121.
Ford v. United States, 273 U. S. 593.

United States v. Schonweiler, 19 F. 2nd 387.
United States v. Ferris, 19 F. 2nd 925.

The cases which the Court does mention seem to us clearly distinguishable.

It is to be noted that the District Court's jurisdiction depended upon the fact that the defendant was "first brought" into that district by the Army, as we believe, in violation of law. The fact that his subsequent removal from the District of Columbia to the District of Massachusetts may have been by due process is not, therefore, in our view material. The question is whether the District Court in Massachusetts acquired jurisdiction over the person of the defendant if brought into the district in violation of a law of the United States.

(j) The removal of the defendant from Germany by the United States Army was in violation of the laws of the United States.

International law grants to political offenders against one government a right of asylum in the territories of another.

Ex parte Kentucky v. Dennison, 24 How. 66.
United States v. Rauscher, 119 U. S. 407.
Hyde: *International Law,* p. 1019.

This principle has been embodied in our extradition treaties, among them that with Germany. 47 U. S. Stat. Part 2, p. 1862.

Neither the war nor the subsequent military occupation abrogated the treaty of extradition with Germany.

Clark v. Attorney General, 331 U. S. 503.
Neely v. Henkel, 180 U. S. 109, 120.
The Axis in Defeat, State Dept. Pub. No. 2423, p. 72.

Both international law and treaty may create private rights. Since asylum is granted primarily for the benefits of the individuals involved, the right of asylum is a private right to be enforced by the Courts.

United States v. Rauscher, 119 U. S. 407.

It seems clear that the defendant could not have been extradited or brought here by any process of law. The Attorney General had no authority to cause him to be removed except by proceedings authorized by law.

Valentine v. United States, 299 U. S. 3, 9.

Moreover, the employment of the Army was in direct violation of statute, 10 U. S. C., Section 15. The principle that the Army shall not be used to execute civil process existed before that statute was enacted and stems from the Petition of Right in 1688.

Ex parte Merryman, Taney: Circuit Court Decisions, Campbell, p. 246.

(k) Congress has not by law directed the place of trial of treason committed within the territorial jurisdiction of a foreign government.

Art. III, Section 2, Paragraph 3, of the Constitution, provides:

> "The Trial of all Crimes, except in cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed in any State, the trial shall be at such Place or Places as the Congress may by law have directed."

The only provision of law referred to by the Government as directing the place of trial of treason committed in Germany is Section 41 of the Judicial Code, which provides

> "*Offenses on the High Seas.* The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought."

Language substantially identical with that of Section 41 was held "to apply only to offenses committed on the high seas, or in any river, haven, basin, or bay."

Ex parte Bollman, 4 Cranch 75, 136.

It was held not to apply to crimes committed in the Indian Country, and, therefore, that no place for trial of crimes in such territory had been directed.

United States v. Alberty, 24 Fed. Cas. No. 14426.
United States v. Starr, 27 Fed. Cas. No. 16379.
United States v. Ivy, 26 Fed. Cas. No. 15451.
United States v. Ta-wan-ga-ca, 28 Fed. Cas. No. 16435.

See also:

United States v. Chapman, 14 F. 2nd 312, 313.
1 Op. Atty. General, 57.
19 Op. Atty. General, 66, 67.

Moreover, Congress has repeatedly given legislative approval to a construction of Section 41 as not applicable to offenses on land by specific direction for the places of trial of many crimes, other than treason, committed on land beyond the territories of the United States. See 18 U. S. C., Sections 499, 500, 338b, 494; 48 U. S. C., Section 1417; 22 U. S. C., Sections 1203, 142; 28 U. S. C., Section 50; 16 U. S. C., Section 27.

The dictum in *United States v. Bowman*, 260 U. S. 94, to the contrary, was made in a case in which no question of

venue was raised below and no appearance nor argument made for the defendant in this Court.

(1) The defendant was not "first brought" into the District of Massachusetts.

The defendant was brought into the United States by plane which crossed the boundary in the air over the State of Maine bound for the District of Columbia, but landed in Massachusetts, because of mechanical trouble, where the defendant was transferred into another plane and brought to Washington.

The jurisdiction of the District Court was based upon the allegation that the defendant was "first brought" into the District of Massachusetts within the meaning of Section 41 of the Judicial Code.

"Brought", counsel below agreed, means "brought in custody".

Kerr v. Shine, 136 F. 61.

"Brought", we submit, means "brought with intent to leave" and not "brought in the mere course of transit".

Taylor v. United States, 207 U. S. 120, 124.

That construction has been given the words "first brought" when a defendant was brought into the country by sea. The fact that the ship on which the defendant was brought anchored first in one district, or that the defendant was transferred from one vessel to another in that district, was held not to prevent the district for which the defendant was destined and to which he was brought from being regarded as that into which he was "first brought".

United States v. Arwo, 19 Wall. 486.
Pedersen v. United States, 271 F. 187.
United States v. Baker, 5 Blatch. 6.

We see no reason for distinguishing between a ship traveling the sea and one traveling the air. If there is merely a temporary pause at a port in one district for transfer to another plane as an incident of a continuous voyage to another district, the prisoner has not been "brought" to the first district.

If, however, there is such a distinction between the two means of transportation that a prisoner traveling in a plane is brought into any district which he enters, we assert that the appellant was first brought into the District of Maine. "First brought" must refer either to the point of entrance or to the point of ultimate disembarkation. No sound reason can be urged why Congress should select as the place of trial of persons brought into the United States *in custody* an intermediate point of transfer selected solely for the purpose of facilitating the voyage.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, and that to such an end a writ of certiorari should be granted and this Court should review the decision of the United States Court of Appeals for the First Circuit and finally reverse it.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 487

DOUGLAS CHANDLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Ford, D.J.) denying petitioner's motion to dismiss the indictment (R. 41-51) is reported at 72 F. Supp. 230. The opinion of the district court denying petitioner's motion for discovery and inspection (R. 38-40) is reported at 7 F.R.D. 365. The opinions of the district court denying petitioner's motion for leave to inspect the grand jury minutes (R. 40), denying his motion for a bill of particulars (R. 41), denying his motion for discharge from custody (R. 56-58), and finding him sane (R. 52-56), are not reported.

The opinion of the Court of Appeals (R. 1908-1946) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered December 3, 1948 (R. 1946). The petition for a writ of certiorari was filed December 29, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F.R. Crim. P.

QUESTIONS PRESENTED

1. Whether treason against the United States can be committed outside the territorial jurisdiction of the United States.

2. Whether broadcasting by radio of propaganda for the enemy, from the enemy country, for pay, for the purpose of weakening the country of allegiance and insuring the enemy's success, constitutes treason.

3. Whether the treasonable nature of what was said in a recording on a specific occasion for subsequent broadcast in a program of psychological warfare, the overt act of making the utterance being established by two-witness proof, may be inferred from the other evidence in the case.

4. Whether proof of the effectiveness of the enemy's program of psychological warfare by broadcasting radio propaganda, in which petitioner participated, was necessary to prove treason.

5. Whether, where the treasonable enterprise is of long duration, "more than a few" overt acts are required to be established by two-witness proof.

6. Whether the fact that petitioner's treasonable acts were committed out of a pure motive, a sincere belief that it was in the best interests of his country to lose the war, is relevant.

7. Whether petitioner was tried in a forum designated by Congress for the trial of treason committed without the territorial jurisdiction of the United States.

8. Whether the venue for petitioner's trial for treason was properly laid in the district of Massachusetts.

9. Whether the manner of petitioner's removal from Germany to the United States precluded his trial for treason against the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The first clause of Section 3, Article III of the Constitution provides:

> Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The last clause of Section 2, Article III of the Constitution provides:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 1 of the Criminal Code (18 U.S.C., 1946 ed., 1; now contained in 18 U.S.C., 1948 Revision, 2381) provided:

> Whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

Section 41 of the Judicial Code (28 U.S.C., 1946 ed., 102; now 18 U.S.C., 1948 Revision, 3238) provided:

> The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district where the offender is found, or into which he is first brought.

STATEMENT

Petitioner was indicted (R. 1-9) in the United States District Court for the District of Massachusetts for treason. The indictment alleged that from

December 11, 1941, to May 8, 1945, petitioner, a native-born citizen of the United States and a person owing allegiance to the United States, treasonably adhered to the enemies of the United States, to wit, the Government of the German Reich and the German Radio Broadcasting Company, its officials, and employees, giving these enemies aid and comfort. Petitioner's adherence and giving of aid and comfort to these enemies allegedly consisted of his having worked as a radio speaker and commentator in the U. S. A. Zone of the Short Wave Station of the German Broadcasting Company, which was controlled by the German Government, this work including the preparation and composition of commentaries, talks, and announcements and their recording for subsequent broadcast by radio from Germany to the United States. It was further alleged that these activities of petitioner were intended to persuade citizens and residents of the United States to decline to support the United States in the conduct of the war, and to weaken and destroy confidence in the administration of the Government of the United States.

Twenty-three overt acts were alleged (R. 3-8), all involving incidents of petitioner's broadcasting activities, and all alleged to have been committed with treasonable intent and for the purpose and with the intent to adhere to and give aid and comfort to the enemies of the United States.

After the court had found petitioner sane (R.

52-56), following an extensive preliminary hearing as to his mental capacity, he was tried before a jury. Six of the overt acts (Nos. 12-14, 19-21) were withdrawn by the Government prior to its opening statement (R. 412); seven others (Nos. 3, 7, 8, 10, 11, 15, 16) were withdrawn by the court prior to the submission of the case; and ten (Nos. 1, 2, 4-6, 9, 17, 18, 22, 23) were submitted to the jury (see *infra*, pp. 18-20). Petitioner was found guilty (R. 1860-1861), the jury making special findings that each overt act submitted to them was "a treasonable act committed by the defendant Chandler with an intent to betray the United States" (R. 32-33). Petitioner was sentenced to imprisonment for life and to pay a fine of $10,000 (R. 34, 1870). On appeal, the judgment of conviction was affirmed by the Court of Appeals for the First Circuit (R. 1946).

The evidence adduced by the Government may be summarized as follows:

Petitioner was born in Chicago in 1889 and has always been a citizen of the United States (R. 582). In 1931, he and his wife and their two small children went to Europe (R. 583), and he did not return to the United States until December 1946, when he was brought back from Germany in military custody (R. 56-57, 443-444).

From 1931 to 1941, petitioner and his family traveled extensively, and lived from time to time in France, Austria, Germany, Yugoslavia, and Italy (R. 583-598). In 1933, petitioner made his

first visit to Germany, where he met one Hoffman, an attache in the German Press Department, and a contact man for foreign journalists (R. 584). Through Hoffman, he became interested in the National Socialist regime and was greatly impressed by Nazi ideals and Hitler's social program (R. 584-585, 587-589). In 1936, in visits to Berlin, he met two families, the Schirmers and the Von Buelows, who were ardent Nazis (R. 593). In 1940, after the outbreak of war in Europe, while living in Florence, he became alarmed at the possibility of American involvement in the war as an ally of England (R. 598-599), and corresponded with the Von Buelows and Hoffman, who were in Germany, asking them if they "could suggest any way by which I could effectively work for the preservation of peace" (R. 599). The Von Buelows mentioned to him the possibility of his speaking over the German broadcasting system (R. 599).

In the winter of 1940-1941, all Americans in Florence were being urged by the American consul in that city to return to the United States, but due to his wife's ill health and his "rapidly crystallizing determination to actively fight against war participation," petitioner decided not to return to the United States (R. 599-600). He wrote to the Von Buelows that he was "willing to come to Berlin and see what plan they had to offer" (R. 600).

Unable to secure American passport facilities with which to travel to Germany, he secured a Ger-

man *Fremdenpass* (alien identity card) from the German consul in Florence, and in mid-February 1941 went to Berlin (R. 600). There he visited his friend, Dr. Schirmer, who was head of the Radio Broadcasting Division of the German Foreign Office, and told him of his "passionate wish to help protect my country from the horrors of war and that I would be happy to be permitted to speak over their broadcasting facilities as a 'free lance' commentator," stating that he was not interested in compensation (R. 600). Schirmer, however, told him that "such a detached setup would be impossible; that if I were to go to the microphone it would have to be within the frame of all other broadcasters, and that a salary or honorarium would be afforded me" (R. 602).

Through the Von Buelows, petitioner met Dr. Froelich, contact man for foreign journalists in the Press Department of the Ministry of Propaganda (R. 602). Froelich showed petitioner the broadcasting headquarters, explained how the commentators operated, and introduced him to subordinates, who offered him a tentative contract (R. 603). Some confusion ensued because petitioner discussed his project with the Propaganda Ministry, as well as with the Foreign Office (R. 602-603, 720-721, 732).

Petitioner then returned to Florence, discussed the plan with his wife, and finally determined to go through with the project. In March 1941, petitioner, his wife, and two daughters, all traveling

on German identity cards, motored to Germany in a car which bore the American flag. (R. 603-604, 888.)

Petitioner spent several weeks at the Propaganda Ministry's broadcasting offices formulating an approach for his messages. Froelich proposed use of a *nom de plume,* which he thought would add interest to the broadcasts, and petitioner agreed on condition that he could reveal his identity thirty days after commencing. (R. 604-605.) Petitioner chose "Paul Revere" as a name peculiarly appropriate to his mission of warning against British efforts to involve the United States in the war (R. 605, 607, 1046-1047). By way of theme "trade mark," it was decided to use the sound of galloping horses' hoofs and *Yankee Doodle* played on a flute (R. 605, 925). Recordings of this "trade-mark" were made with considerable care (R. 605). Petitioner wished to begin his broadcasts on April 18, 1941, the anniversary of Paul Revere's ride (R. 605, 606), but owing to technical difficulties he did not commence his talks until a week after that date (R. 606).

Petitioner's initial broadcasting contract was for six months (R. 609). Despite administrative and personal difficulties which he encountered during this period—he was in ill health and did not get paid regularly—he persevered in what he deemed to be his compelling duty (R. 606-609, 749). At the end of the six-month period, he left Berlin for a number of weeks to recuperate from his

illness and to negotiate a new contract (R. 609-610).

The Japanese attack on Pearl Harbor took place at about the time he returned to Berlin (R. 610). The United States' entry into the war made resumption of his broadcasting activities "a more complicated matter" (R. 610), but he "considered it his duty to keep up and continue his work," since he was convinced that the United States "was entering the war on the wrong side" (R. 722). Moreover, he considered the declaration of war by the United States against Germany merely "technical," since there had already been an "undeclared war in existence" for some months previous thereto (R. 610, 748). He did not consider being repatriated from Berlin along with the other Americans living there, but, on the contrary, early in 1942, informed Dr. Knochenhauer, the Propaganda Ministry lawyer, that he was prepared to resume his broadcasting activities (R. 611-612).

Thereafter, petitioner executed three contracts covering his work as a radio commentator (R. 612). One (Ex. 5, R. 448-449), with the Short Wave Station of the German Reich Radio Corporation, dated January 7, 1942, provided for a monthly salary of 1,000 marks; a second (Ex. 6, R. 450), with the Foreign Language Service Press Corporation, dated January 31, 1942, provided an additional salary of 750 marks a month; the third (Ex. 8, R. 510, 577, 1873), with the Anti-Komintern,

also dated January 31, 1942, called for a further monthly salary of 750 marks. Petitioner was responsible, however, only to the Short Wave Agency, the making of three contracts having been only for bookkeeping reasons (R. 612-613). His aggregate monthly salary of 2,500 marks a month (about $750 a month (R. 792)) made him the highest paid commentator on the German short wave network (R. 1175).[1]

From February 1, 1942, when these contracts went into effect, until July 1942, when petitioner's first wife died (R. 882, 1018, 1094), petitioner made two or three broadcasts a week (R. 613, 615, 821, 1175). He resumed his broadcasting activities in October 1942 (R. 615, 722-723). From December 1942 to May 1943, petitioner and his friend Wagner, the news editor of the U. S. A. Zone of the German Short Wave radio (R. 1082), worked on a program for German propaganda broadcasts beamed to the American troops in North Africa (R. 1097-1099, 1118-1128, 1132). This program (Ex. 35, R. 1099, 1100-1104) was designed to arouse doubt, homesickness, worry, and fear of the future in the American troops, and to "gradually arouse the belief that the U. S. again, as in 1917-18, is fighting on the wrong side" (R. 1101). Petitioner wanted to participate in the program (R. 1104), and suggested that he be selected to read poetry to raise "the cultural

[1] Schotte, who was chief of the entire U. S. A. Zone, and who gave petitioner instructions as to what to say (R. 1173-1175, 1087-1088, 1226-1227), received only 900 marks a month (R. 1175).

level and * * * gain listener interest" (R. 1104, 1121, 1128-1129, 1140). Petitioner personally selected the poetry to be read (R. 1129). In May 1943, however, petitioner was suspended from his post by Cleinow, the Superintendent of the Short Wave Agency, for denouncing Wagner to the Gestapo for pro-Semitism, and this suspension continued until some time in September 1943 (R. 617, 843-845, 1042, 1050-1051).

During this period of suspension, petitioner retained a lawyer to help him get restored to duty (R. 620, 844-845). In September 1943, in response to a letter from Cleinow, petitioner went to Berlin, and agreed to resume broadcasting on condition that he could make his recordings elsewhere, since he was no longer willing to work side by side with Wagner (R. 617-618, 845-846, 1042-1043). This was agreed to (R. 1043-1044), and petitioner thereafter made his recordings in Vienna until October 1944 (R. 618-619, 845-846, 981, 1071). The German short-wave transmitter had in the meantime been moved from Berlin to Koenigswusterhausen, 25 miles distant (R. 822, 936, 980), and petitioner's recordings were brought by courier from Vienna to Koenigswusterhausen (R. 846, 1053), where they were re-recorded on magnetic tape for broadcasting (R. 934-935, 936, 1051-1052).

In the spring of 1944, petitioner stopped broadcasting for about two months because of ill health and then resumed (R. 618, 723, 922). Beginning

in October 1944, he made his recordings in Munich (R. 619, 833-834, 981). His last broadcasts were in January or February 1945 (R. 492, 618, 961), and when, in late February or early March 1945, Cleinow wished him to return to Koenigswusterhausen for additional broadcasting, petitioner declined to expose himself to the dangers of that place and suggested making his recordings at Landshut (R. 873-875, 957-960, 999-1000, 1595-1597).

Throughout his activities as a broadcaster, petitioner was alert to protest whenever there was any interruption in his pay (R. 823, 830-831, 1072), and on one occasion he insisted that his daughters, who had appeared on a musical program with him (R. 890), be paid also (R. 822-823, 1038). When petitioner was asked by Cleinow to resume his broadcasting activities in September 1943, one of the conditions he insisted on was that his salary be paid more regularly (R. 1042); and as late as March 1945, when petitioner was discussing with his friends, the Sittlers, the demand by Cleinow that he return to Koenigswusterhausen to resume broadcasting, he complained that his salary payments were in arrears (R. 877).

The substance of petitioner's broadcasts and his intent to betray the United States.—Nazi Germany used foreign radio broadcasts as a means of psychological warfare against its enemies. The broadcasts were designed "to support the German war effort by creating disunity in other peoples by

undermining [their] morale" (R. 789), "to create disunity among the Allies, * * * to build up racial controversies [in the United States], to create unrest regarding the economic inequalities in the country, to work on minority problems and similar ideas, with the purpose of ultimately driving a wedge between the people and the Roosevelt Administration * * *" (R. 1088). The five principal themes of German radio propaganda implemented these aims. They were (1) Bolshevism, the No. 1 Enemy, (2) Anti-Semitism, (3) German Social Progress, (4) German Military and Moral Might, and (5) England's Economic and Political Decline (R. 790-793, 1089-1092, 1174). Moreover, "The commentators were told to use the threat of inflation * * * as a means of propaganda, all to create unrest along that line. * * * Commentators were told to stress themes along the lines that America would never be able to win the war, that it would be much too costly, that the establishment of a Second Front would fail * * *, that actually America had nothing to do in this European war, that America had no war aims, that the GI did not know what he was fighting for; * * * to create homesickness among the American troops and defeatism in general * * *" (R. 1091-1092).

The German propaganda machinery was carefully devised so that these themes, originated by the very head of the Nazi state (R. 789-790), would filter down through the commentators to the listen-

ers. The Propaganda Ministry, under Dr. Goebbels, was directly responsible to Hitler (R. 781-782). Goebbels received his directives from Hitler (R. 785-786), and transmitted these to his subordinates at conferences held daily (R. 785-786, 793, 802-803). Goebbels discussed the military and political situations, and told his staff what to play up and what to play down (R. 802, 804). This ministerial conference was followed by a smaller one, presided over by Fritsche, head of the Radio Division of the Propaganda Ministry, at which directions were given as to how to handle the news "and what line of the daily propaganda was being observed" (R. 786-787). Winkelnkemper, head of the Reich Radio Corporation, which was wholly owned by the German Reich (R. 783, 795) and under the jurisdiction of the Propaganda Ministry (R. 782-783), attended both of these daily conferences (R. 786, 787). Thereafter he held a conference of his own, at which his subordinates, including the Zone heads of the overseas broadcasting service, were present (R. 787-788, 1172; Ex. 34, R. 789). Following Winkelnkemper's conference, the head of the U. S. A. Zone—Schotte, later Koischitz, and finally Houben (R. 784-785, 830, 1172)—held a Zone commentators' conference, at which the directives of that day were passed on to the commentators (R. 1087-1092, 1173, 1227-1228). Petitioner regularly attended the daily conference of commentators for the U. S. A. Zone (R. 671, 821-822, 1173), and met

from time to time with other English-speaking broadcasters (R. 1092, 1094), including the notorious Lord Haw-Haw[2] (R. 1092).

Deviations from the party line were summarily dealt with; Schotte, for example, the head of the U. S. A. Zone, spent four months in a concentration camp for not properly censoring remarks at variance with a Propaganda Ministry directive (R. 1172, 1194-1196). Petitioner's manuscripts were, prior to recording, subject to political (R. 821, 1072, 1086-1087) and military censorship (R. 821, 826). The German broadcasts were carefully beamed to the United States (R. 648-650, 687-688), and consisted of a German portion lasting one hour and an English portion lasting six hours, the latter made up, in equal parts, of news and commentary, and music and entertainment (R. 1069-1070).

Twelve recordings (Exs. 21-32) made by petitioner, fully identified as such (R. 637, 641-648, 768, 769-776, 823-824), were offered in evidence, not to prove any overt act, but to show petitioner's treasonable activities and his intent to betray (R. 653, 655, 656, 767, 1821). All twelve recordings were played back to the jury, and the close concordance between petitioner's broadcasts and the official propaganda themes of his Nazi employers are indicated by the record references set out in the mar-

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[2] As to whom, see *Joyce* v. *Director of Public Prosecutions*, [1946] A. C. 347.

gin.[3] The recordings clearly establish, also, petitioner's desire that the country of his allegiance lose the war (Ex. 23, R. 1211, 1214; Ex. 24, R. 1146-1147, 1147-1148; Ex. 25, R. 1216-1217; Ex. 26, R. 812, 813, 815; Ex. 27, R. 974-975; Ex. 31, R. 1067-1068; Ex. 32, R. 835-836), and were, of course, consistent with his wish, frequently expressed in conversation, that Germany win the war (R. 752-753, 917, 920, 1086, 1204, 1206), and his hope that the United States would drop out by way of a negotiated peace (R. 753, 1204-1205, 1207). "He thought it his mission to drift the United States out of the war" (R. 1205). Many of these broadcasts of petitioner's were heard by monitoring stations in the United States (R. 491, 494, 695-696, 705).

Prior to the indictment on which he was tried,

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[3] *Bolshevism as Enemy No. 1:* Ex. 21 at R. 713; Ex. 22 at R. 1056, 1058; Ex. 27 at R. 974; Ex. 29 at R. 806; Ex. 31 at R. 1064.

Anti-Semitism: Ex. 21 at R. 710, 714; Ex. 22 at R. 1061; Ex. 24 at R. 1145, 1147; Ex. 25 at R. 1216, 1218-1219, 1221; Ex. 26 at R. 811, 812, 813, 815; Ex. 27 at R. 972-973, 978; Ex. 28 at R. 760-765; Ex. 29 at R. 806-807, 809-810; Ex. 30 at R. 754, 755, 759; Ex. 31 at R. 1063, 1064; Ex. 32 at R. 836-840.

Social Progress in Germany: Ex. 21 at R. 712-713; Ex. 22 at R. 1055-1061; Ex. 24 at R. 1149; Ex. 25 at R. 1217-1221; Ex. 27 at R. 975-976.

Germany's Military Might: Ex. 23 at R. 1212-1214; Ex. 24 at R. 1148-1149; Ex. 25 at R. 1218; Ex. 27 at R. 974-978; Ex. 31 at R. 1068; Ex. 32 at R. 835-836.

England's Decline: Ex. 24 at R. 1148; Ex. 31 at R. 1062-1067; Ex. 32 at R. 835.

America Can't Win: Ex. 23 at R. 1210-1215; Ex. 24 at R. 1147-1148; Ex. 25 at R. 1216-1217, 1220; Ex. 26 at R. 811-815; Ex. 27 at R. 974; Ex. 32 at R. 835.

America's Post-War Financial Collapse: Ex. 24 at R. 1143-1147.

petitioner had on July 26, 1943, been indicted for treason in the District of Columbia (R. 553), and he learned of this earlier indictment while still in Germany (R. 751, 1084). He was not surprised by this news, however, "because he considered this a natural consequence of the ideological war that he was fighting * * *" (R. 740). And upon first being interviewed by an American Army officer in May 1945, he said that his plans were to return to the United States and to be tried for treason (R. 492, 499, 503). Petitioner never considered giving up his American citizenship, and could not understand his friend Sittler's having done so (R. 899-900, 923-925, 1019-1020). "He [petitioner] felt he was a better patriot than many Americans who were over here" (R. 1019); yet he wore the Nazi swastika on his clothing (R. 635, 663-664, 681-682, 683-684).

The overt acts submitted to the jury.—Ten overt acts were submitted to the jury, who, in special findings, found that each of them was "a treasonable act committed by the defendant Chandler with an intent to betray the United States" (R. 32-33). Generally stated, three of the overt acts (Nos. 9, 17, and 18; R. 5, 7) charged that petitioner arranged for or made actual recordings; three (Nos. 2, 4, and 5; R. 4), that he participated in conferences looking to the improvement or formulation of broadcasts; and four (Nos. 1, 6, 22, and 23; R. 3-4, 4-5, 8), that he participated in conferences relative to the resumption or continuation of his broadcast-

ing activities. Each and every one of these ten overt acts was established by the requisite two-witness proof, but, in the interest of brevity, the evidence in respect of only overt acts Nos. 17 and 18 is here summarized.[4]

Overt act No. 17 charged that between July 5 and July 25, 1944, at Koenigswusterhausen, petitioner spoke into a microphone in a recording studio of the German Short Wave Radio Station to record a talk for subsequent broadcast by the Station. Edward and Lily Sittler both testified that during the month of July 1944 petitioner stated that he wanted to make a recording of mixed poetry and music (R. 869, 964-965, 997). Both testified that they went with him to the radio house at Koenigswusterhausen, and were with him while he made the recording (R. 869-871, 998, 1595). Both testified that Mrs. Sittler performed the duties of an absent technician (R. 870-871, 896, 998), both saw petitioner speaking into the microphone (R. 870, 999), and both testified that he announced himself at that time as Paul Revere (R. 870, 998). Both likewise testified that making the recording in question was petitioner's idea (R. 869, 997, 1033), that he selected

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[4] Since a treason conviction may be had on any single overt act established by the testimony of two witnesses, and since the jury in this case made special findings in respect of each and every one of the ten overt acts submitted to them, it is not, of course, necessary for the Government to demonstrate the constitutional sufficiency of each one of the ten overt acts. Compare *Haupt* v. *United States*, 330 U. S. 631, 641, note 1, with *Cramer* v. *United States*, 325 U. S. 1, 36, note 45.

American poetry (R. 938, 997, 1034) and Grieg's Peer Gynt Suite (R. 938, 1034), and that the program was designed to commemorate Americans killed in the war (R. 869, 937-938, 966-967, 1034).

Overt act No. 18 charged that between June 1 and October 31, 1944, at some time other than that alleged in overt act No. 17, petitioner at Koenigswusterhausen, spoke into a microphone in a recording studio of the German Short Wave Radio Station for the purpose of making a dialogue recording with Edward Sittler for use by the station. Edward Sittler and Von Richter both testified that, in the summer of 1944, Sittler and petitioner, after returning from a reception for broadcasters given by the Propaganda Ministry, came to Von Richter at Koenigswusterhausen and suggested making a dialogue recording (R. 871-872, 1074). Both testified that a recording was made, that Von Richter considered it too long and not sufficiently interesting, and that thereupon a second and satisfactory recording was made (R. 872-873, 1074, 1142-1143). Both saw petitioner speaking into the microphone (R. 872, 1074). Sittler testified that Von Richter stated that he intended to broadcast the recording that same night (R. 873), and Von Richter testified that the recording was in fact so broadcast (R. 1075). According to Sittler, the subject-matter of the recording concerned the relative armament-producing capacity of the United States and Germany (R. 873, 897-898).

ARGUMENT

1. Petitioner contends that an American citizen residing in the territory of the enemies of the United States does not, by adhering to such enemies, giving them aid and comfort, commit treason against the United States (Pet. 6, 12-14). The contention is without merit. The constitutional definition of treason was specifically shaped to include treason committed abroad; Congress clearly intended to provide for the punishment of such foreign treasons; and nothing in the incidents of the enemy status which attaches to an American resident in enemy country permits such an individual voluntarily to betray his native land.

(a) That the draftsmen of the constitutional definition of treason (*supra*, p. 3) intended that there should be no territorial limitation in respect of the place where the crime might be committed, is perfectly clear from the history of the constitutional provision, as summarized by the Court of Appeals (R. 1917-1918). That history demonstrates that the limiting language, "within their territories [i.e., of the United States]," which was contained in a proposed definition of the crime, was voted down, and that the definition finally adopted was without any limiting territorial language. Congress, therefore, was clearly given the power to denounce the crime regardless of where it might be committed.

(b) Congress promptly exercised that power by providing in the Act of April 30, 1790, c. 9, §1, 1

Stat. 112, that "if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort *within the United States or elsewhere,* * * * such person or persons shall be adjudged guilty of treason against the United States * * *" [italics added]. This language was carried forward, without pertinent change, into R.S., §5331, and into §1 of the Criminal Code of 1909, 18 U.S.C., 1946 ed., 1, and is now found in 18 U.S.C., 1948 Revision, 2381 *(supra,* p. 4). As the court below observed, "In view of the striking similarity between the constitutional definition of treason, and the almost contemporaneously enacted statutory definition, the same reasons which lead to the conclusion that the constitutional provision encompasses foreign treasons also indicate that the statutory language is to be read in similar comprehensive fashion" (R. 1919). Indeed, in view of the specific language of the statute, "within the United States or elsewhere," there is no room for inference or speculation on the matter. Congress has *expressly* provided for the punishment of "foreign" treason. That treason need not be committed in the United States to be punishable is thus more easily demonstrated than that conspiracy to defraud the United States need not be committed in the United States to be punishable, a proposition which is now well settled. *United States* v. *Bowman,* 260 U.S. 94. Cf. *Skiriotes* v. *Florida,* 313 U.S. 69, 73-74. It is in-

teresting to note that petitioner's argument was unsuccessfully made by Roger Casement in *Rex* v. *Casement*, [1917] 1 K. B. 98.

(c) But petitioner suggests that it "has always been recognized that, by reason of the obligation of local allegiance to the country of residence, there might be in such a case some adherence which was not criminal" (Pet. 13). Of course, it is clear that in respect of his property an American resident in enemy territory during wartime is deemed to be an enemy, and this follows regardless of his nationality, personal sentiments, or loyalty.[5] But, manifestly, residence in enemy territory does not qualify or cancel the permanent allegiance owed to one's own country. The circumstance that while petitioner was in Germany he could not plot against Germany did not authorize him to engage in activities there which would be treason against the United States. An American citizen living in enemy country is not, therefore, by that fact rendered incapable of committing treason against the United States. He must obey the enemy's laws while living in the enemy's territory. But he cannot actively support the enemy's effort to crush the country of his permanent allegiance. For to do so

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[5] *The Venus*, 8 Cranch 253; *The Frances*, 8 Cranch 335; *The Mary and Susan*, 1 Wheat. 46; *Mrs. Alexander's Cotton*, 2 Wall. 404; *Miller* v. *United States*, 11 Wall. 268; *Ford* v. *Surget*, 97 U. S. 594; *Juragua Iron Co.* v. *United States*, 212 U. S. 297.

is to betray the country of his permanent allegiance, and is clearly treason. As the Court of Appeals observed, "the present case [does not] necessitate any detailed examination as to how far an American citizen, caught in an enemy country at the outbreak of war, may, in order to earn a living and without the stigma of treason, accept employment which in these days of total war might conceivably be of some aid in the enemy war effort. Here, as elsewhere in the law, there may be troublesome questions of degree. It is enough to say that in our opinion the present case falls clearly on the treasonable side of the line" (R. 1945).

2. Petitioner contends that "mere words" cannot constitute treason, that all he did was utter "mere words," and that his conviction was, consequently, erroneously sustained (Pet. 6, 14-17). We submit that the contention is preposterous.

The heart of the present case is whether an American citizen is guilty of treason when, in time of war, he broadcasts propaganda for the enemy, from the enemy country, for pay, for the purpose of weakening his own country and insuring the enemy's success. We submit there can be only one answer to this inquiry. Of course such a person commits treason. He adheres to the enemy, he gives the enemy aid and comfort, he intends to betray his own country. He makes himself a part of the enemy's propaganda organization, which

the enemy recognizes to be part of its war machine. He does so for hire (although the consequences would not be different if he were a volunteer). He desires the enemy and not his own country to win the war in which they are engaged, and actively works to that end. This, we submit, is treason by any definition.

It is true, as remarked by the court below, that "There are occasional statements to be found in the books to the effect that mere words cannot amount to an overt act of treason" (R. 1932). Thus, it was said in *Wimmer* v. *United States,* 264 Fed. 11, 12-13 (C.A. 6), certiorari denied, 253 U.S. 494, that " * * * one cannot, by mere words, be guilty of treason." And again, "Words oral, written, or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime." *Charge to Grand Jury,* Fed. Cas. No. 18,271, 30 Fed. Cas. 1034, 1035 (C.C., S.D.N.Y.). Isolated statements of this nature no doubt lend a degree of plausibility to petitioner's present contention, but only when read *in vacuo,* apart from the context in which they were written. Manifestly, the writers of such statements as those quoted did not have in mind any such potent weapon as radio propaganda in total war. Petitioner's argument, moreover, proves too much. For, obviously, "One may commit treason by conveying military intelligence to the enemy, though the only overt act is the

speaking of words," and "Other cases may readily be imagined where the speaking of words might constitute treason" (opinion below, R. 1933).

In *Joyce* v. *Director of Public Prosecutions*, [1946] A.C. 347, the essence of the charge was identical with the one here under consideration. The contested issue was whether Joyce, admittedly not a British subject, was by reason of his possession of a British passport sufficiently under the King's protection to be guilty of treason. But counsel for Joyce did not even venture to argue, either at the trial, or in the Court of Criminal Appeal (*Rex* v. *Joyce*, 173 L.T.R. 377), or in the House of Lords, that broadcasting for the enemy did not amount to treason. And the minority in *Cramer* v. *United States*, 325 U.S. 1, discussing the question of intent, on which there was no division of opinion in this Court, said (325 U.S., at 57): "Propaganda designed to cause disunity among adversaries is one of the older weapons known to warfare, and upon occasion one of the most effective. * * * When [Cramer] was shown consciously and voluntarily to have assisted this enemy program [of propaganda] his traitorous intent was then and there sufficiently proved."

This case presents no question as to how far a citizen residing in this country may go, in wartime, in exercising his right of free speech in domestic political activity. We submit that the court below was clearly correct when it said, "It

is preposterous to talk about freedom of speech in this connection; the case cannot be blown up into a great issue of civil liberties" (R. 1935). For "it cannot be said that what Chandler did was merely exercising his right of free speech in the normal processes of domestic political opposition. He trafficked with the enemy and as their paid agent collaborated in the execution of a program of psychological warfare designed by the enemy to weaken the power of the United States to wage war successfully. * * * Trafficking with the enemy, in whatever form, is wholly outside the shelter of the First Amendment" (*ibid.*). Petitioner adhered to the enemy; he gave the enemy aid and comfort. This was treason, and the fact that his adherence and aid consisted of uttering words of propaganda over the radio waves rather than shooting bullets—participating in psychological warfare designed to undermine American fighting morale rather than dropping bombs or betraying military secrets—is of no moment.

3. Next petitioner contends, "If treason may be committed by 'mere words,' it is not enough to allege and prove by the direct testimony of two witnesses that the defendant spoke or prepared to speak" (Pet. 17); the Government is required to allege as an overt act, and establish by two-witness proof, exactly what he said (Pet. 7, 17-19).

Of course, the Government did establish exactly what petitioner said on twelve specific occasions by

introducing in evidence and playing for the jury twelve different recordings of petitioner's voice (*supra*, pp. 16-17). Such convincing proof of the intent to betray and the commission of overt acts in furtherance of that intent is rarely available in a court of law, and petitioner, indeed, does not deny the making of the recordings. But those recordings were received in evidence solely on the issue of petitioner's intent to betray, not as overt acts which the Constitution and the statute require to be proved by the testimony of two witnesses. The overt acts relied upon by the Government as having been established by the requisite two-witness proof were the ten acts to which we have referred in the Statement, *supra*, pp. 18-20. Two of those overt acts (Nos. 17 and 18) consisted of making recordings for subsequent broadcast. The Government established each of these acts by two-witness proof, but because it did not show precisely what petitioner said on either of those occasions, or that what he then said was *per se* treasonable, petitioner urges that the constitutional requirement was not met. We submit that the contention is clearly without merit.

Petitioner's contention is completely refuted by the *Haupt* case, 330 U. S. 631. For in that case, as the court below pointed out (R. 1940, n. 5), "the two witnesses testified to an overt act which to them was entirely innocent, namely, that the defendant accompanied his son to the house of a prospective

employer to further the son's application for employment. This act was shown to be a treasonable one by the other evidence in the case, indicating that the son, to the knowledge of the father, was an enemy agent bent on a mission of sabotage."

4. Petitioner further contends that "If treason may be committed by 'mere words,' it should be made to appear that the words actually gave aid and comfort to the enemy" (Pet. 19). It is clear that by this petitioner means that participating in the enemy's program of psychological warfare by broadcasting propaganda designed to undermine American morale and weaken the American will to carry on the war is not treason unless there is proof that the "propaganda was effective" (Pet. 19).

If this contention is sound, then Benedict Arnold was no traitor, since he failed in his effort to deliver West Point to the British. If sound, petitioner might have joined and served in the German Army, yet could escape conviction for treason in the absence of proof that the operations in which he participated won ground for the Nazis, or that the bullets which he fired found their mark. If sound, it would not be treason to deliver to the enemy a paper containing military secrets, if the enemy agent lost the paper before delivering it to his superiors to be put to use. As Treby, L.C.J., said in *Trial of Captain Vaughan,* 13 How. St. Tr. 485, 533, "* * * And if this [cruising in a French warship in English waters, prepared to engage the

English in action] be not adhearing [to the enemy], &c. it may as well be said, that if the same persons had made an attack upon our ships, and miscarried in it, that had not been so neither; because that in an unprosperous attempt there is nothing done that gives aid or comfort to the enemy. And after this kind of reasoning they will not be guilty, till they have success; and if they have success enough, it will be too late to question them."

Obviously, success in a treasonable enterprise is not required to sustain a conviction for treason. "[Haupt's] acts aided an enemy of the United States toward accomplishing his mission of sabotage. The mission was frustrated but defendant did his best to make it succeed." *Haupt* v. *United States,* 330 U. S. 631, 644.

5. It is difficult to understand petitioner's contention that "If the indictment * * * is to be construed as charging a single treasonable enterprise, direct proof by two witnesses of more than a few routine and insignificant overt acts was required" (Pet. 20, 7). He in effect concedes that "not all the details in that enterprise need have been proved by two witnesses" (Pet. 20), but suggests that "more than a few" overt acts were required to be established by the two-witness quantum of proof. If we correctly understand the contention, it is that while a single overt act, established by the testimony of two witnesses, will suffice to

sustain a treason conviction where the treasonable activity is of short duration and consists of but one or a few overt acts, the number of overt acts required to be established by two-witness proof increases in proportion to the duration and enormity of the treasonable enterprise. But to state the contention is to refute it. The Government established by overwhelming evidence petitioner's adherence to the enemy and his intent to betray, and proved by two witnesses each of ten overt acts of adherence and rendering aid and comfort. This, manifestly, was more than sufficient, since any one overt act, proved by two witnesses, would have sufficed under the constitutional and statutory requirement.

6. Petitioner contends he could not be guilty of treason because he "had the heart of a patriot," because he "acted from patriotic motives" (Pet. 22), because he acted on the "sincere conviction" that his broadcasting activities on behalf of the German Reich were done in "the best interests of the United States" (Pet. 7). We shall assume, for argument, that his motives were pure, as he claims, but submit that that fact is utterly irrelevant, and obviously so.

Purity of motive, as the court below tersely observed, "is a matter that may be sifted out at the last Great Judgment Seat; but the law of treason is concerned with matters more immediate" (R. 1943). Adhering to the enemy, rendering him aid

and comfort, with the intent to betray, is what the court in a treason prosecution is concerned with; what motivates the adherence, the aid, and the betrayal is a matter quite beside the point. *Cramer* v. *United States,* 325 U. S. 1, 29; see also *Haupt* v. *United States,* 330 U. S. 631, 641-642. Purity of motive has never been deemed to save an intentional act, otherwise criminal, from the consequences of criminal conduct. The existence or non-existence of a motive to commit a crime is, to be sure, evidential on the issue whether the defendant at the bar was the culprit; but where that fact is established by the evidence, the purity or the vileness of the defendant's reasons for committing the crime is of no moment. Petitioner may have believed that his country was on the wrong side of the late war and deserved to lose it. But that fact, if it was a fact, has no greater relevance in this case than a murderer's belief that his victim deserved to die.

7. Petitioner's contention that "Congress has not by law directed the place of trial of treason committed within the territorial jurisdiction of a foreign government" (Pet. 8, 25-27) is also without merit. To the contrary, Congress has specifically provided that "The trial of all offenses committed upon the high seas, *or elsewhere out of the jurisdiction of any particular State or district,* shall be in the district where the offender is found, or into which he is first brought" [italics added]. 18

U. S. C., 1948 Revision, 3238.[6] *Ex parte Bollman,* 4 Cranch 75, relied on by petitioner as authority for his contention that this statute has no application in this case (Pet. 26), is not such an authority; as the court below pointed out, that case holds that the "first brought" provision has no application to a crime committed within the territorial jurisdiction of a district court. It would be a strange result if, after Congress had defined treason to include treasons committed abroad, the literal language of the above-quoted venue provision were held not to define the venue for the trial of such treasons. *United States* v. *Bowman,* 260 U. S. 94, 102, rejects petitioner's argument that the phrase "or elsewhere" in the venue statute refers only to the high seas.

8. Petitioner was brought from Germany to the United States by a plane destined for the District of Columbia. After passing over the state of Maine, the plane made a forced landing in Massachusetts and later proceeded to the District of Columbia. The Government believed that the "first brought" clause required petitioner to be brought to trial in Massachusetts and, accordingly, petitioner was reindicted and tried in that district. Petitioner contends, on alternative theories, that he was "first brought" either into Maine or the District of

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[6] Enacted pursuant to the constitutional provision that "The Trial of all Crimes * * * shall be held in the State where * * * committed; but when not committed within any State, * * * at such Place or Places as the Congress may by Law have directed" (Art. III, Sec. 2, last clause, *supra,* p. 4).

Columbia. The Court of Appeals held that "the district into which the accused is first taken under custody and landed is the district into which the accused is 'first brought' * * * and this was the district of Massachusetts in the case at bar." The court stated:

> * * * Such an interpretation is consistent with all the decided cases to which our attention has been directed. It is an interpretation which furnishes a rule of convenient application, turning on easily provable objective facts and not depending upon an inquiry into the intent of the persons who had the accused in custody. [R. 1924-1925].

9. Finally, petitioner contends that the "District Court ought not to have exercised jurisdiction" over his person since his removal "from Germany by the United States Army was in violation of the laws of the United States." Specifically, it is asserted (a) that under international law and by a treaty with Germany petitioner had a right of asylum in Germany which was violated by his removal to the United States, and (b) that the use of the Army to effect his removal was in violation of 10 U. S. C. 15 (Pet. 23-24). These contentions are thoroughly refuted by the opinion of the Court of Appeals (R. 1925-1930), to which, in the interests of brevity, reference is made. In brief, the court below held (a) that the extradition treaty between the United States and Germany (47 Stat. 1862) did

not obligate the United States, where it and its military allies have assumed the powers of sovereignty in Germany, to refrain from bringing an American citizen to trial for treason; (b) that while under international law a State may grant asylum to a fugitive offender against the laws of another State, it is not obliged to do so but may surrender the fugitive; and (c) that the Act of June 18, 1878, 20 Stat. 152, 10 U. S. C. 15, prohibiting the use of the Army as a *posse comitatus,* has no application "to occupied enemy territory, where the military power is in control and Congress has not set up a civil regime."

CONCLUSION

The judgment below is clearly correct, there is no conflict of decisions, and no question is presented which requires further review by this Court. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Supreme Court of the United States

October Term, 1948.

No. 487.

DOUGLAS CHANDLER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING.

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Now comes the above-named petitioner, Douglas Chandler, and presents this his petition for a rehearing of the above-entitled cause, and, in support thereof respectfully shows:

The Court on February 28, 1949, denied a petition for a writ of certiorari to review a decision of the United States Court of Appeals for the First Circuit affirming a judgment of the United States District Court for the District of Massachusetts that petitioner was guilty of treason. The sentence was that petitioner be imprisoned for the term of his natural life and pay a fine of Ten Thousand Dollars. Petitioner is now serving his sentence.

The case raised a number of important questions, never decided by this Court. The fundamental questions were these:

1. Whether treason may be committed by making speeches in opposition to a war in which the United States is engaged.

2. If so, whether the defendant may show and the jury may consider that he spoke from patriotic motives in a sincere belief that opposition to the war was in the best interests of the United States.

The discussion of these questions in the brief in support of the petition for certiorari was, as we thought required by the rules, limited to enough to show the Court the doubts inherent in them. It was further limited by the fact that they were not the sole issues presented. That discussion may well be regarded as superficial. We shall not here repeat what was said in that brief, nor attempt to reargue the matter at length, but shall add only this:

The only authority cited by the Government in support of the proposition that "broadcasting propaganda on behalf of an enemy is a treasonable act" is *Joyce v. Director of Public Prosecutions*, (1946) A. C. 347.

That case differs both in its facts and the law applicable from this. The Treason Act, 1945, had been passed, shortly before the trial, to remove the requirement of proof of an overt act by two witnesses. There was testimony by one witness as to a broadcast in September or October, 1939, to the effect that:

> "The prisoner's voice stated that Dover and Folkstone had been destroyed and this remained firmly in

my memory on account of the fact that there had been no enemy activity on Folkstone up to that date."

Trial of William Joyce, (Notable British Trials) ed. by J. W. Hall, p. 65.

The jury might have found, therefore, that Joyce had broadcast information known to be false.

But, more significantly, as the Government brief in opposition (p. 26) points out:

"Counsel for Joyce did not even venture to argue, either at the trial, or in the Court of Criminal Appeal, or in the House of Lords, that broadcasting for the enemy did not amount to treason."

There was no challenge to the sufficiency of the indictment. In argument to the jury, counsel for Joyce appointed by the Court, went so far as to say (*Ibid,* p. 206):

"I will assume against myself that in the years 1941, 1942, 1943, and 1944 he was adhering to the King's enemies."

The conviction of Joyce and its affirmance by the Court of Criminal Appeal and the House of Lords involved no decision of the question whether broadcasting propaganda is treason. That question was never raised by counsel for Joyce and was not noticed by any Court. Moreover, the conviction has not met with general approval. Mr. J. W. Hall, the editor of the report cited above, said in his Introduction (p. 35):

"* * * I have found, with a universal reprobation of Joyce's conduct, an almost equally universal feeling, shared by lawyers and laymen, servicemen and civilians, that (with the utmost respect to the eight out of nine learned judges) the decision was all wrong, and that an unmeritorious case has made bad law."

See also: Rebecca West: *The Meaning of Treason,* pp. 55-65.

The question here arises, we need hardly remind the Court, not under the Act of 25 Edward 3 as amended by the Treason Act, 1945, but under the Constitution, Art. III, Section 3, which by the use of the word "only" and the requirement of proof of an "overt act" had attempted to restrict the definition of treason.

The framers of the Constitution were familiar with Montesquieu's *Spirit of the Laws,* and were greatly influenced by it. They must have read in Book XII, c. 12, "Of indiscreet speeches":

> "Nothing renders the crime of high treason more arbitrary than declaring people guilty of it for indiscreet speeches. Speech is so subject to interpretation; there is so great a difference between indiscretion and malice; and frequently so little is there of the latter in the freedom of expression, that the law can hardly subject people to a capital punishment for words unless it expressly declares what words they are.
>
> "Words do not constitute an overt act; they remain only in idea. When considered by themselves, they have generally no determinate signification; for this depends on the tone in which they are uttered. It often happens that in repeating the same words they have not the same meaning; this depends on their connection with other things, and sometimes more is signified by silence than by any expression whatever. Since there can be nothing so equivocal and ambiguous as all this, how is it possible to convert it into a crime of high treason? Wherever this law is established, there is an end not only of liberty, but even of its very shadow."

They must have known the words of John Milton in his *Areopagitica:*

> "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."

They were of the same generation and shared the political ideas of Lord Erskine, who said in his speech in defense of Thomas Paine (1 Erskine's Speeches, 523):

"Had he a right to promulgate these opinions? If he entertained them, I shall argue that he had."

Thomas Paine, who had published his "Rights of Man" in England while remaining in France, might have been called a propagandist in 1792, if that word had then had its present meaning.

Sir Matthew Hale in his *Pleas of the Crown* had written (p. 114):

"By all which it seems, that regularly, 1. words of themselves cannot make high treason; words of themselves are not a sufficient overt-act within the statute of 25 E. 3 to serve as an indictment of compassing the King's death.

"And with this agrees that notable case of Mr. Pyne in Croke's reports, T. 4 (Car. (r) the words of which are these: 'Upon consideration of the precedents of the statutes of treason it was resolved by the seven judges there named, and so certified to his majesty, that the speaking of the words there mentioned, though they were as wicked as might be, were not treason; for they resolved, that, unless it were by some particular statute, no words will be treason; for there is no treason at this day, (viz. 4 Car. 1) but by the statute of 25 E. 3 for imagining the death of the King, and the indictment must be framed upon one of the points in that statute; and the words spoken there can be but evidence to discover the corrupt heart of him that spake them; but of themselves they are not treason, neither can any indictment be framed upon them.' "

Our own Courts have held that the "dissemination of ideas", no matter what their nature, does not constitute treason.

United States v. Werner, 247 Fed. 708, 710.

In that case the defendants were indicted for treason, and filed a demurrer. The Court explained the grounds for demurrer, as follows:

"Even if the indictment be read as charging as the overt act the publication of a newspaper containing certain utterances, it nevertheless means only giving expression to the quoted sentiments, and, however disloyal and traitorous the sentiments may be, the utterance of them does not constitute the crime of treason."

The Court quoted from the charge to the Grand Jury, reported in 5 Blatch. 550, Fed. Cas. No. 18271:

"Words oral, written or printed, however treasonable, seditious or criminal of themselves, do not constitute an overt act of treason, within the definition of the crime."

The Court declined to construe the indictment on demurrer as read by the defendants, but said:

"It is, of course, clear that if the law of treason be as thus stated, and, for the purpose of presenting the point upon which this demurrer is ruled we will assume it is, and if, at the close of the case, the United States has proven against the defendants only the utterance of treasonable sentiments, the law of the case must be so pronounced."

The 1918 Report of the Attorney General, at page 42, states the further proceedings:

"The court, however, at the end of the Government's testimony, dismissed the case on the ground that articles of this nature, which do not convey information to the enemy, but are an attack upon the war, cannot constitute the crime of treason. This decision made it clear that the treason statute could not be used against propaganda, however disloyal or dangerous, except in the rare cases where there is available proof that the propagandist is an agent of the enemy. The defendants were thereupon indicted and later tried and convicted under the espionage act."

The exception suggested by the Attorney General has no support in history or logic. If words cannot be overt acts under the treason statute, the fact that the words are spoken by an agent of the enemy will not make them acts.

Upon appeal in the proceedings under the Espionage Act, the convictions were affirmed in *Schaefer v. United States,* 251 U. S. 466. In a dissenting opinion in which Mr. Justice Holmes joined, Mr. Justice Brandeis said, in part, at page 493:

> "To prosecute men for such publications reminds me of the days when men were hanged for constructive treason. And, indeed, the jury may well have believed from the charge that the Espionage Act * * * had in effect restored the crime of constructive treason."

The portion of the charge referred to is set out in a footnote, not here quoted in full, but concluding:

> "Congress could not call some mere words treason, because the Constitution prohibits it; but there is no constitutional limitation on the power of Congress to declare those things a crime which Congress has done in this act."
>
> *Wimmer v. United States,* 264 F. 11, cert. den. 253 U. S. 494.

In that case the indictment was under that provision of the Espionage Act of June 15, 1917, which read:

> "Whoever shall by word or act support or favor the cause of any country with which the United States is at war or by word or act oppose the cause of the United States therein, shall be punished."

The defendant contended that the Act was unconstitutional because it punished treasonable conduct without proof of the overt act by two witnesses.

The Court sustained the conviction, saying in part:

> "A very similar contention was summarily overruled by the Supreme Court in *Frohwerk v. U. S.,* 249 U. S. 204, 210.
>
> " * * * Here the only conduct alleged or proved, as making out the offense, consists of oral statements—words only. It is well settled that one cannot, by mere words, be guilty of treason (38 Cyc. 954, and cases

cited), and thus the fallacy of Wimmer's contention becomes apparent * * *

"* * * Hence it may well be said that adherence by words only is an offense quite distinct from treason."

In the *Frohwerk* case, to which the Court in the *Wimmer* case referred, Mr. Justice Holmes disposed of a like contention by saying:

"These suggestions seem to us to need no more than to be stated."

United States v. Herberger, 272 F. 278.

This was a naturalization case in which the Court quoted with approval from the Charge to the Grand Jury, 30 F. Cas. 1936, No. 18272:

"Mere expressions of opinion indicative of sympathy with the public enemy * * * are not sufficient under the Constitution and laws to warrant a conviction of treason."

See also:

Chafee: *Free Speech in the United States,* pp. 259-260:

"Chief Justice Marshall said long ago that treason should not be extended by construction to doubtful cases, and there has never been a decision that talking against a war is treason. If it were, Vallandigham, Milligan, and the other Copperheads would surely have been prosecuted for this crime * * *

"* * * But if words are used in a speech demanding immediate peace, this is not assistance by acts at all, and furnishes the enemy with nothing but emotions of dubious value. Judges have frequently declared that expressions of opinion are not treason."

The question in this case is not whether Congress may make words in opposition to a war an offense. Congress did so in the Espionage Act of 1918, since repealed. The question is whether utterances and acts in preparation for them, not conveying information to the enemy, but expressing only sentiments sincerely believed to be in the interests

of the United States, constitute treason. All prior decisions, as we understand them, were that they did not.

We respectfully submit that the matters raised by the petition for certiorari require the consideration and determination of this Court, and, therefore, urge that this petition for a rehearing be granted and that the judgment of the District Court of the United States for the District of Massachusetts be, upon further consideration, reversed.

Respectfully submitted,

EDWARD C. PARK,
Counsel for Douglas Chandler.

CERTIFICATE OF COUNSEL.

I, EDWARD C. PARK, counsel for the above-named petitioner, do hereby certify that the foregoing petition for a rehearing of the cause is presented in good faith and not for delay, and that the petition is restricted to the grounds above specified.

EDWARD C. PARK.

CERTIORARI DENIED